LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 5 196
JOHN F. DAVIS, CLERK

No. 712

In the Supreme Court of the United States

OCTOBER TERM, 1961

JOHN D. GRECO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
HERBERT J. MILLER, JR.,
Assistant Attorney General,
BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statutes involved	2
Statement	4
Argument	8
Conclusion	12

CITATIONS

Cases:	
Campbell v. United States, 365 U.S. 85	11
Campbell v. United States, 296 F. 2d 527	11
Statutes and rule:	
18 U.S.C.:	
2314	2, 4
2315	2, 4
3500	2, 10, 11
Rule 15, F.R. Crim. Proc.	9

831014—62

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 712

JOHN D. GRECO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 300–307; Pet. App. 29–37) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1962 (R. 300; Pet. App. 29, 40). The petition for a writ of certiorari was filed on February 8, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court could properly try the petitioner for the knowing transportation in interstate commerce and knowing receipt in interstate and foreign commerce of securities stolen in Canada.

2. Whether the government's failure to produce F.B.I. agents' handwritten notes of interviews of witnesses, where the notes had been destroyed after reports reflecting their contents had been prepared, entitled the petitioner to relief under 18 U.S.C. 3500.

STATUTES INVOLVED

18 U.S.C. 2314 provides in pertinent part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud * * *
>
> * * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.
>
> * * * * * *

18 U.S.C. 2315 provides in pertinent part:

> Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken * * *
>
> * * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.
>
> * * * * * *

18 U.S.C. 3500 provides in pertinent part:

> (a) In any criminal prosecution brought by the United States, no statement or report in the

possession of the United States which was made by a Government witness * * * to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. * * *

* * * * *

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

STATEMENT

A three-count indictment returned in the District Court for the Southern District of New York charged the petitioner with violations of 18 U.S.C. 2314 and 2315 by the transportation in interstate commerce and receipt in interstate and foreign commerce of stolen securities valued at more than $5,000, with knowledge that the securities had been stolen, and with having conspired with one Edward Loree to commit those offenses (R. 5–11). Before trial, Loree pleaded guilty to the indictment, and was the chief government witness against the petitioner at the trial. After having waived a jury trial, the petitioner was tried to the court and found guilty as charged (R. 12, 26, 234, 298–299). Thereafter, on August 24, 1961, the petitioner was sentenced to concurrent terms of imprisonment of five years on each of the counts (R. 240–241, 299). On appeal, the conviction was unanimously affirmed (R. 300–307; Pet. App. 29–37).

The pertinent facts may be summarized as follows:

1. Before trial, counsel for both sides stipulated that if one Daniel Meunier were called as a witness, he would testify that, on January 27, 1958, he was the chief accountant of a bank in Montreal, Canada, that on that day he discovered that the bank vault had been broken into, that the contents of several safe deposit boxes and a safe, previously observed by him to have been in the vault were gone, and that an inventory of missing bonds "included in the face amount, $36,500 of bonds set forth" in the indictment (R. 30–31).

Loree testified that, in early April 1958, petitioner asked Loree whether he could sell some bonds at 70–80% of face value, with petitioner and Loree making 20% on the deal, which they would split between them. Subsequently, the petitioner told Loree that the bonds were "stolen Canadian municipal bonds" (R. 36–39). Several days later, when Loree and the petitioner were in a restaurant, a package was delivered to petitioner and given by him to Loree. The package contained Canadian bonds with a face value of $36,500 (R. 42).

After some unsuccessful attempts to dispose of the bonds in New York, Loree telephoned the petitioner and said that he was leaving for Miami in an effort to make a sale there. Petitioner told Loree to let him know about any sale as soon as possible, because "the people were pressing" (R. 46). Shortly thereafter, Loree traveled to Miami and contacted a man there regarding a possible sale of the bonds. Loree then telephoned the petitioner in New York and said that he had a tentative deal on with the bonds (R. 47, 62). The petitioner said that it would be "wonderful" if Loree could sell the bonds, because he, the petitioner, had to "either sell them or give them back to the people," who were "pressing [him] for payment" (R. 47). On the following day, Loree was arrested in Miami by F.B.I. agents. Loree gave the agents the bonds that the petitioner had given him (R. 49).

2. The only other witness called by the government was one Albert DeKoninck who testified that he met the petitioner in late 1957 or early 1958, and that the

petitioner told him that he had some United States Savings Bonds which belonged to an aunt of his and which he wanted "to borrow some money on" (R. 129). When DeKonmeck asked the petitioner why the aunt could not cash the bonds at a bank at full value, the petitioner told DeKonmeck to "forget about it" (R. 131).

3. At the conclusion of the direct[2] examination of Loree, the government furnished the petitioner with (1) an unsigned statement by Loree based on an interview in Miami on April 22, 1958 (Gov. Ex. 2); (2) an F.B.I. report of that same interview with Loree in Miami (G. Ex. 6); (3) a signed statement by Loree dated April 24, 1958, made in New York (Gov. Ex. 3); (4) a signed statement by Loree dated May 20, 1958 (Gov. Ex. 4), also in New York; and (5) Loree's grand jury testimony (Gov. Ex. 5). A singed statement by DeKonmeck dated June 9, 1958 (Gov. Ex. 8), was given to petitioner at the conclusion of the testimony of that witness.

After the court had ascertained that there were no notes, recordings or other mechanical transcriptions of conversations between the witnesses and the agents (R. 150-157), a *voir dire* hearing was held.

The agents who interviewed Loree and DeKonmeck in New York testified that the substance of each interview was incorporated into the statements signed by them (R. 162-182). In the interview of April 24,

[2] Loree testified that in 1957 the petitioner showed Loree three Series "E" Savings Bonds which were made out to a woman in Newark, New Jersey. Petitioner said that he could obtain seven or eight thousand dollars' worth of those bonds and asked Loree if he could sell them (R. 50-51).

agent Latchford took notes which he used to prepare the statement which Loree subsequently signed (R. 180–181). He took about five or six pages of notes (R. 181); the signed statement (Gov. Ex. 3) is seventeen pages in length. He compared the finished report with his notes to see that the finished product fully and fairly reflected the interview notes. He kept the notes until he read the finished typed product and then destroyed the notes (R. 182).

At the May 20 interview with Loree in New York and the June 9 interview with DeKonineck, agent Milenky took notes. He testified that he made handwritten notes at the time and from these notes dictated the statements that the witnesses signed (R. 160–161). Loree's statement was prepared from, at most, a page and a half of notes which were for the "guidance" of Milenky in dictating the statement. The notes were not "verbatim" accounts of what Loree had said, but were "key phrases, key words, maybe a date or so, an outline of what [would] go into the statement" (R. 169, 171). Agent Milenky said that he rarely wrote out a sentence unless there was a "direct quote," in which case he "would incorporate the direct quote in quotation marks in the report" (R. 169). He said that Loree was present and was consulted, according to F.B.I. practice, while the statement was being dictated (R. 168). The notes were not "identical" to the statements, nor were the notes "incorporated" into the statements (R. 170, 173). After the statements were prepared, agent Milenky compared the notes to the statements and found that the statements fully reflected or "covered" the contents of the notes (R.

161). The notes were then destroyed because "there was no necessity for keeping extra paper. It was already in print" (R. 161, 174–175).

Counsel for both sides stipulated that five F.B.I. agents were present during the interview of Loree in Miami, and that four of the agents did not take any notes at that time (R. 187). As to the fifth agent, one Lenihan, it was stipulated that, if he were called as a witness, he would testify that he took notes during the interview with Loree, that those notes were destroyed "after the reports based upon those notes were completed," and that the exhibits based upon the interview with Loree (G. Exs. 2 and 6) "contain[ed] all of the facts which were set forth in the interview notes" (R. 187–188; see R. 184–185).

ARGUMENT

1. The contention (Pet. 13–16) that the district court did not have jurisdiction to try petitioner for transportation of stolen bonds in the United States because the bonds were stolen in Canada is frivolous. The federal statute does not punish the theft, whether it occurred in Canada or the United States; the federal statute prohibits the use of the facilities of interstate or foreign commerce for the purpose of transporting stolen property. Congress manifestly has the power to decide that it would not be in the interests of the

---

[1] Agent Gallagher testified that he was present during the two interviews in New York with Loree and during the interview of DeKoninck, but either did not take any notes or could not recall if he took notes at that time (R. 178–179). He said that it was his practice, after conducting an interview, to see that the notes were fully incorporated into the statement (R. 178–179).

United States to permit any stolen property to be knowingly transported through the instrumentalities of interstate or foreign commerce in the United States.

Petitioner argues (Pet. 17–19) that, had he sought the attendance of Canadian witnesses at the trial, the district court would have been unable through process to compel their attendance, and that, therefore, the district court could not "constitutionally" try him because any such trial would be in violation of his "absolute" right to compulsory process under the Sixth Amendment. But, as the court of appeals correctly pointed out (R. 307; Pet. App. 37), "the Sixth Amendment can give the right to compulsory process only where it is within the power of the federal government to provide it. Otherwise any defendant could forestall trial simply by specifying that a certain person living where he could not be forced to come to this country was required as a witness in his favor." In the instant case, the petitioner made no effort to secure the attendance of any Canadian witness, nor did he move the district court for leave to take depositions of foreign witnesses under Rule 15, F.R. Crim. Proc., although the court specifically indicated that the deposition channel was open to him (R. 23–24). Indeed, the petitioner stipulated with the government before the trial to the facts surrounding the theft of the bonds in Canada (R. 30–31). Under the circumstances, the petitioner was not denied his Sixth Amendment rights to compulsory process.

2. The contention (Pet. 9–13) that the destruction of the F.B.I. notes of interviews of Loree and De-

Kominek was "tantamount to a refusal to produce [statements of witnesses] under Sub-section (d), [which required] the imposition of Section 3500 sanctions" is without merit on the facts of this case. The *voir dire* examination discloses that the notes in this case were merely the personal memory jogs of the agents, to be used in preparing at the time of each interview a statement to be signed by the witness. These statements were in fact turned over to the defendant pursuant to 18 U.S.C. 3500(e)(1). As to the first Miami statement, which Lowe did not sign, the agent also made a later report which was turned over to the petitioner, but the basic situation is the same. The notes of the interviews involved in this case were merely a method of preparing the statement, which was the true embodiment of the interview, and it was the statement that contained the full presentation of what the witness had told the agent. This procedure is designed to record the results of the interview in a way that will facilitate production of statements under 18 U.S.C. 3500(e)(1) with as little question as possible as to what is truly the statement of the witness, *i.e.*, an integrated statement approved by the witness as his own without the comments and interpolations often previously included in an agent's notes. Agent Milenky testified that it was normal F.B.I. practice, which he followed, to consult with the witness while the statement was being dictated (R. 168).

The handwritten notes were not in any way a "verbatim recital" (see 18 U.S.C. 3500(e)(2)) of what the witness had said. Agent Milenky testified

that he wrote down mostly key words. Agent Latchford took five or six pages of notes on what turned into a seventeen page report. There was thus no reason for the agents to keep the notes after the full statement, which was the real report of the interview, had been dictated, typed and (in the cases where that occurred) signed by the witness.

This case is thus materially different from *Campbell* v. *United States*, 365 U.S. 85. In that case, the witness testified that he thought he had read over and signed the agents' notes. He denied that the report prepared by the agent on the basis of the notes—a report which the witness had not seen until trial—was an accurate account of what he had said. This Court held that it was error to place upon the defendant the burden of calling the agents to show why the notes had been destroyed. Here there is nothing at all similar to *Campbell*, where on the record before this Court the notes of the agents themselves could possibly be construed to represent a statement adopted by the witness.* The testimony here is clear that the notes were not such a statement, but were merely the agent's personal aids in preparing the statement of the witness. There is no reason why, where a full record of

*On remand from this Court, after a hearing in the district court, the court of appeals ruled that since the notes had not been specifically approved by the witness and were not a substantially verbatim transcription of the interview, they were not producible under 18 U.S.C. 3500. *Campbell* v. *United States*, 296 F. 2d 527 (C.A. 1).

the interview is made at the time, signed or unsigned, agents should be required to keep and subsequently explain their own particular methods of note-taking.

Petitioner had a full report of each interview with the witness. He was not entitled to anything more.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys.

MARCH 1962.